UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:	FAA Order No. 94-39
BORIS KIROLA	Served: December 9, 1994
	Docket Nos. CP94EU0048, CP94EU0051

DECISION AND ORDER

Complainant has appealed from the Order Denying Complainant's Motion to Reconsider issued by Administrative Law Judge Robert L. Barton, Jr.,[1] finding that both agency counsel and the Assistant Chief Counsel for the Eastern Region engaged in obstreperous and disruptive behavior under Section 13.205(b) of the Federal Aviation Regulations (FAR), 14 C.F.R. § 13.205(b).[2] For the reasons set forth below, the decision of the law judge is reversed.

Resolution of this appeal requires a review of the procedural history of the case. In February 1994 Complainant filed two complaints against Respondent. One complaint alleged violations of the Federal Aviation Act of 1958, as amended (the Act), 49 U.S.C. App. § 1471, and the other alleged violations of the Hazardous

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[1] A copy of the law judge's order is attached.

[2] Section 13.205(b), 14 C.F.R. § 13.205(b), provides:

> *Limitations on the power of the administrative law judge.* The administrative law judge shall not issue an order of contempt, award costs to any party, or impose any sanction not specified in this subpart. If the administrative law judge imposes any sanction not specified in this subpart, a party may file an interlocutory appeal of right with the FAA decisionmaker pursuant to § 13.219(c)(4) of this subpart. This section does not preclude an administrative law judge from issuing an order that bars a person from a specific proceeding based on a finding of obstreperous or disruptive behavior in that specific proceeding.

Materials Transportation Act, as amended, 49 U.S.C. App. § 1809.[3] Each complaint sought a total civil penalty of $10,000.

Respondent, through counsel, filed answers to the complaints denying the allegations. Counsel for Respondent stated that Respondent was in a war zone in Croatia and was unable to return to the United States.

On March 15, and April 28, 1994, the law judge issued, *sua sponte,* pre-hearing orders requesting additional information on each case from Complainant. The two orders included a request by the law judge for Complainant to list specific civil penalty amounts for each violation alleged in the complaints. Complainant responded on April 21, and May 18, 1994, providing the information requested by the law judge, except for specific civil penalty amounts for each violation alleged in the complaints. Complainant explained in its responses to the law judge's orders that it arrived at the $10,000 civil penalty in each complaint based on the evidence known to it at the time and the totality of the circumstances, after considering the factors for assessing civil penalties listed in the Act and the regulations. Complainant argued in both responses that "it would be inappropriate to try to apportion that penalty ($10,000), violation by violation, prior to the presentation of all the evidence at the hearing on this case."

On June 2, 1994, the law judge ordered Complainant and Complainant's counsel to show cause why sanctions should not be imposed against them for refusing to obey his orders to list specific civil penalty amounts for each violation alleged in the complaints.

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[3] Both complaints arose from the November 4, 1991, incident in which Respondent allegedly offered checked baggage containing undeclared weapons and ammunition to American Airlines for transportation from San Francisco, California, to Munich, Germany. Specifically, Respondent's checked baggage contained: 71 pistols, an assault rifle, an AT-9 machine gun with silencing device, and 1470 rounds of small-arms ammunition. According to Respondent's counsel, Respondent and the weapons were seized by police when they arrived in Germany.

On June 20, 1994, Complainant withdrew both complaints. Nevertheless, on July 14, 1994, the law judge issued an order finding that Complainant's counsel had engaged in obstreperous and disruptive behavior by refusing to comply with his orders to list specific civil penalty amounts, and for failing to file a response to the order to show cause. On July 28, 1994, Complainant filed a motion to reconsider, asking the law judge to reverse his order finding that Complainant's counsel had engaged in obstreperous and disruptive behavior.[4]

The law judge denied Complainant's motion to reconsider on August 3, 1994, and made the additional finding that Complainant's Assistant Chief Counsel for the Eastern Region had also engaged in obstreperous and disruptive behavior because she had not responded to a separate June 2, 1994, order.[5] On August 4, 1994, the law judge dismissed, with prejudice, the two cases based on Complainant's withdrawal of the complaints. Complainant filed its notice of appeal on August 17, 1994.

Because the law judge lacked jurisdiction to issue findings of obstreperous and disruptive behavior once the complaints were withdrawn, his order of August 3, 1994, must be reversed. Moreover, even if the law judge had jurisdiction, the agency attorneys' conduct was not obstreperous or disruptive under Section 13.205(b) of the Rules of Practice,14 C.F.R. § 13.205(b).[6]

After Complainant withdrew the complaints, Section 13.215, 14 C.F.R.

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[4] Although the Rules of Practice, 14 C.F.R. § 13.201 *et seq.*, do not specifically provide for a motion to reconsider, Section 13.218(a), 14 C.F.R. § 13.218(a) provides that "a party applying for an order or ruling not specifically provided in this subpart shall do so by motion." Complainant also could have filed an interlocutory appeal of right with the Administrator under Section 13.219(c), 14 C.F.R. § 13.219(c).

[5] In that separate order the law judge ordered the Assistant Chief Counsel to state if she had reviewed Complainant's responses to the law judge's orders, and if not, to identify the FAA supervisory attorney who had reviewed them.

[6] *See* footnote 2.

§ 13.215, required that the law judge dismiss the proceedings with prejudice.[7] The law judge did so, but only after issuing the two orders finding Complainant's counsel and Assistant Chief Counsel to have engaged in obstreperous and disruptive behavior under 14 C.F.R. § 13.205(b).

The express sanction for obstreperous or disruptive behavior under 14 C.F.R. § 13.205(b) is for the law judge to bar that person from the specific proceeding. However, as the law judge himself stated in his order finding Complainant's counsel to have engaged in obstreperous and disruptive behavior: "since the complaints have been withdrawn, the question of barring him (Complainant's counsel) from these proceedings is moot." (Order of July 14, 1994, at 5). With the exception of the order of August 4, 1994, dismissing the complaints with prejudice, the law judge's orders after Complainant withdrew the complaints were in excess of his authority.

Administrative law judges in FAA civil penalty actions do not retain jurisdiction to decide collateral matters after the complaints have been withdrawn. The cases cited by the law judge, holding that United States District Court judges retain jurisdiction to decide sanctions under Federal Rule of Civil Procedure (FRCP) 11 after voluntary dismissal of the complaint, are inapposite.[8] *See* Cooter & Gell v.

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[7] Section 13.215, 14 C.F.R. § 13.215, provides in relevant part: " At any time before or during a hearing, an agency attorney may withdraw a complaint ... If an agency attorney withdraws the complaint ... the administrative law judge *shall* dismiss the proceedings under this subpart with prejudice." (Emphasis added).

[8] FRCP 11 provides in relevant part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading ... that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law, or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation ... If a pleading ... is signed in violation of this rule, the court ... shall impose ... an appropriate sanction, which may include an order to

Hartmarx Corp., 496 U.S. 384, 395-396 (1990).[9] Though it perhaps goes without saying, administrative law judges are not United States District Court judges.

Another consideration applicable here is that the FRCP are not binding in civil penalty actions brought under the Rules of Practice, 14 C.F.R. § 13.201 *et seq.* *See* In the Matter of KDS, FAA Order No. 91-17 at 5 (May 30, 1991) (holding that although the FRCP may be looked to for guidance in actions brought under the Rules of Practice in Civil Penalty Actions, 14 C.F.R. Part 13, they do not supercede the Rules of Practice.) Furthermore, the reasoning for allowing a United States District Court judge to issue sanctions for violations of FRCP 11 after a voluntary dismissal -- that the violation was complete when the complaint was filed, Cooter & Gell, at 395 -- is not applicable here. There has been no showing that the two complaints in this case were either not well grounded in fact or not warranted by existing law.

The Rules of Practice in Civil Penalty Actions contain a provision similar to FRCP 11, in Section 13.207.[10] Under that section of the Rules of Practice, the law judge could have dismissed the complaints if he had found Complainant's failure to

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> pay ... the amount of reasonable expenses incurred because of the filing of the pleading ... including a reasonable attorney's fee.

[9] The law judge cited several cases from U.S. Courts of Appeals on this point that were decided before the Supreme Court resolved the differences between the circuits in Cooter & Gell v. Hartmark Corp., 496 U.S. 384 (1990). *See e.g.,* Schering Corp. v. Vitarine Pharmaceuticals, Inc., 889 F.2d 490 (3rd Cir. 1989); Szabo Food Service, Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987).

[10] Section 13.207, 14 C.F.R. §§ 13.207, provides in relevant part:

> (b) *Effect of signing a document.* By signing a document, the attorney of record ... certifies that the attorney ... has read the document and, based on reasonable inquiry ... the document is- (1) Consistent with these rules; (2) Warranted by existing law or that a good faith argument exists for extension, modification or reversal of existing law; and (3) Not unreasonable or unduly burdensome or expensive ...
> (c) *Sanctions.* If the attorney of record ... signs a document in violation of this section, the administrative law judge ... shall (1) strike the pleading signed in violation of this section....

plead specific civil penalty amounts for each alleged violation not warranted by existing law. However, unlike FRCP 11, which permits the award of attorney fees and costs, no sanction other than the striking of the offending pleading is permissible under Section 13.207(c).

The Court in Cooter & Gell noted that United States District Court judges generally retained jurisdiction after voluntary dismissal of a complaint to award attorney fees and costs, and issue contempt citations, under federal statutes and federal common law. Cooter & Gell at 395. Administrative law judges in FAA civil penalty actions, however, have no authority to award costs or to issue contempt citations,[11] and may issue awards of attorneys fees only under the separate procedures set out in Part 14 of the Rules of Practice, 14 C.F.R. § 14.01 *et seq.*, implementing the Equal Acess to Justice Act, 5 U.S.C. § 504 (1980).[12]

Finally, it is my view that even if the withdrawal of the two complaints had not rendered the proceedings moot, and the law judge had retained jurisdiction to decide whether agency counsel had engaged in obstreperous or disruptive behavior, the conduct of Complainant's counsel and Assistant Chief Counsel in this case did not rise to such objectionable levels.

Attorneys have been excluded by hearing examiners from administrative proceedings for: physically assaulting opposing counsel, Camp v. Herzog, 104 F. Supp. 134, 136 (D.D.C. 1952); for encouraging spectators at the hearing to be disorderly, In the Matter of Weirton Steel Co. and Steel Workers Organizing Commitee, 8 NLRB 581 (1938), *aff'd* NLRB v. Weirton Steel Co., 135 F.2d 494, 496

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[11] See footnote 2.

[12] The limited powers of an administrative law judge are set out in Section 556(c) of the Administrative Procedure Act, 5 U.S.C. § 556(c). They are subject to the published rules of the agency. 5 U.S.C. § 556(c). On matters of law and policy, the law judges are entirely subject to the agency. Association of Administrative Law Judges v. Heckler, 594 F. Supp. 1132, 1141 (D.D.C. 1984).

(3rd Cir. 1943), and for failing to follow the hearing examiner's directions during cross-examination, Ubioteca Corporation v. FDA, 427 F.2d 376, 382 (6th Cir. 1970). Even where an attorney shouted at the witnesses, questioned their intelligence and disparaged their language weaknesses, the examiner's decision to bar the attorney from the proceedings was reversed on appeal as not being contemptous behavior. Great Lakes Screw Corporation v. NLRB, 409 F.2d 375, 380 (7th Cir. 1969).

As the Administrator held in a case prior to the adoption of the Rules of Practice in Civil Penalty Actions, 14 C.F.R. Part 13, Subpart G:

> A relatively narrow range of conduct should be considered sufficiently disruptive to warrant exclusion from a proceeding. A physical assault upon, or physical confrontation with, another person involved in the proceeding would certainly qualify. Yelling and screaming, or other excessive displays of ill-temper, especially if repeated, would also merit exclusion. Persistent rude, racist, or otherwise insulting words directed at other persons involved in the proceeding could likewise be viewed as sufficiently disruptive for this purpose. Repeated misconduct in the course of presenting a case (e.g., a pattern of intimidation of witnesses, harrassment of other parties or the ALJ with superfluous or frivolous motions or objections, obvious and unjustified dilatory tactics), because such misconduct obstructs the actual progress of the proceeding, may also be a ground for exclusion.

Western Airlines Inc., FAA Docket No. 85-108 at 11 (December 8, 1988).

No such obstreperous or disruptive conduct occurred in this case. The case had not yet reached the hearing stage. The law judge's findings of obstreperous and disruptive behavior were based solely on two written responses by Complainant's counsel to discovery orders, *see e.g.*, In the Matter of Detroit Metropolitan Wayne County Airport, FAA Order No. 94-32, n.7 (October 5, 1994) (noting that two written responses to discovery orders were a meager record upon which to base a finding of obstreperous or disruptive behavior), and on the failure of Complainant's counsel and Assistant Chief Counsel to respond to two orders.[13]

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[13] The failure of Complainant's counsel and Assistant Chief Counsel to file responses to the law judge's two orders after the complaints were withdrawn is understandable. It would have been reasonable for agency counsel to have assumed that the withdrawal of the

For all of the above reasons, the orders of the law judge finding Complainant's counsel and the Assistant Chief Counsel for the Eastern Region to have engaged in obstreperous or disruptive behavior are reversed.

DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 9th day of December, 1994.

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complaints rendered the entire proceedings moot, and absolved agency counsel of any further obligation to respond to the law judge's prior orders in the two dismissed cases.